May 31, 1911

Present : Wood Renton J. and Grenier J.

KIRIHAMY *v.* KIRI BANDA *et al.*

133—*D. C. Kurunegala*, 3,971.

Registration—Priority—Mere knowledge of existence of prior unregistered conveyance does not defeat priority by registration—Ordinance No. 14 of 1891, s. 17.

The mere existence in the mind of a man who has obtained a conveyance for valuable consideration, of knowledge of the existence of a prior unregistered conveyance, is not sufficient to deprive him of the right to gain priority by registration.

Kanapathipillai v. Kannachi [1] explained.

A person who had induced another to buy a land, and who had (*inter alia*) enjoyed the produce of the land on behalf of the purchaser, was held to have been guilty of fraud, within the meaning of section 17 of the Registration Ordinance, in taking a conveyance from the original grantor and in seeking to gain priority over that conveyance by registering it.

THE facts are set out in the judgment of Wood Renton J.

Sansoni, for the defendants, appellants.—It has been held in a series of decisions that a person who with notice of a conveyance already made for value in favour of a third party takes a conveyance

[1] *(1910) 13 N. L. R. 166.*

in favour of himself for value and registers it before the earlier conveyance does not get the deed registered by "fraud" within the meaning of the Registration Ordinance. *Siripina v. Tikiria*,[1] *Sennaiya Chetty v. Appuhamy*,[2] *Goonesekera v. Goonetilleka*,[3] 2 *Walter Pereira's Laws of Ceylon, pp.* 564 *and* 565. (Wood Renton J.—But the District Judge holds that the fourth defendant had induced the plaintiff to buy the land.) That would not affect the question of law ; that fact only proves that the fourth defendant had knowledge of the earlier conveyance.

The following cases were referred to at the argument : *Kanapathipillai v. Kannachi ;* [4] *Ramanathan*, 1877, *p.* 198.

H. A. Jayewardene (with him *Grenier*), for the respondent, not called upon.

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The plaintiff-respondent purchased the shares of the land mentioned in the plaint from the sister of the fourth defendant-appellant on deed No. 13,303 dated November 29, 1887, but did not register that deed. The property in suit was seized under a writ by the first, second, and third defendants-appellants against the fourth ; the respondent claimed it, his claim was disallowed, and he thereupon brought the present action under section 247 of the Civil Procedure Code, claiming a declaration that he was entitled to have the lands in question released from seizure on the strength of his conveyance from the sister of the fourth defendant-appellant. The ground on which the property in question was claimed by the fourth defendant-appellant as his own was a transfer by his own sister in his favour by deed No. 15,901 dated January 21, 1898. That deed was duly registered on January 22, 1898. It comes into competition, therefore, with the plaintiff-respondent's unregistered deed, and by virtue of section 17 of Ordinance No. 14 of 1891 is entitled to priority, unless the plaintiff-respondent is in a position to show, as he seeks to show in this case, that there was fraud or collusion on the part of the fourth defendant-appellant in obtaining the deed or in securing the prior registration. I would remark in passing that the first, second, and third defendants-appellants can be in no better position than the fourth. They could only take such title as the judgment-debtor had to give them, and if by reason of fraud his prior registration is deprived of its effects, the claim of the plaintiff-respondent must prevail against them as well as against their judgment-debtor. The sole question that we have to consider in the present case is whether or not fraud in obtaining the deed, or in securing the registration, has been affirmatively proved on behalf

[1] *(1878) 1 S. C. C. 84.*
[2] *(1885) 7 S. C. C. 111.*
[3] *(1902) 2 Br. 399.*
[4] *(1910) 13 N. L. R. 166.*

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of the plaintiff-respondent. The learned District Judge has answered this question in the affirmative, and in my opinion his decision is right.

I would desire to say a few words, first of all, apart from the authorities, and then with special reference to the authorities that have been cited to us in the argument. We must take the facts as we find them stated by the learned District Judge. There is nothing to show that any of his findings upon the evidence are unreliable. That being so, the facts stand thus : The fourth defendant-appellant is the brother of Kiri Menika, through whom he claims. He was present at the execution of Kiri Menika's deed in favour of the plaintiff-respondent, and he was not present as a merely casual observer. It was he who urged the plaintiff-respondent to buy. In addition to that, the deed, after its execution, was put into the custody of his own wife, who is the plaintiff-respondent's daughter, and the fourth defendant-appellant, equally with his wife, enjoyed the produce of the lands in question under that deed. If there is no authority to compel us to come to a contrary conclusion, I should certainly say that a man who had taken such a part in the earlier transaction, as has here been established against the fourth defendant-appellant, was guilty of fraud in taking a conveyance from the original grantor of lands, which he knew perfectly well that she had disposed of to another, and in seeking to gain priority over that conveyance by registering it under Ordinance No. 14 of 1891.

It is said, however, that there are authorities which show that conduct of this kind does not amount to frand, and as there has been some little apparent conflict between the views taken by different Judges in Ceylon in regard to this question, and as we now have had the advantage of looking into all the most important cases, at any rate, bearing on the point, I should like to say something about them. It appears to me that all the cases which have been cited in support of the appellant's contention go no further than to lay down the proposition that the mere existence in the mind of a man who has obtained a conveyance for valuable consideration, of knowledge of the existence of a prior unregistered conveyance, is not to deprive him of the right to gain priority by registration, which the Legislature has expressly secured to him. It will be found that this point forms the *ratio decidendi* in D. C. Kandy, 67,295.[1] It was a decision of three Judges : Clarence A.C.J., Dias J., and Lawrie J. In giving the judgment of the Full Court, Clarence A.C.J. made use of the following language : " Each party is standing on his legal right, and we find no grounds on which we can say that either has been trying to mislead the other. The first mortgagee must be taken to have known that if he did not register his incumbrance a second mortgagee might step in before him. All that is proved respecting

[1] *(1877) Ram. 1877. 198.*

the second mortgagee is that, knowing of the first mortgage, he took the legal steps to secure himself : he is not shown to have done anything underhand or to have made any pretence." The same point arose in *Siripina v. Tikiria*.[1] There Phear C.J. and Clarence J. declined to adopt the view taken by the District Judge of the scope of the term "fraud" in section 39 of Ordinance No. 8 of 1863, which is substantially identical with section 17 of Ordinance No. 14 of 1891, that the mere purchase of land, with the knowledge that the vendor had previously sold to a third person, who had not yet registered his conveyance, amounts to fraud against that person. "We think," said Sir John Phear, "if this had been the intention of the Legislature, it would not have been veiled under the term fraud, but would have been stated expressly. There seems, indeed, to be no fraud in giving full value for the subject of purchase to a person, who, though he may have professed previously to give a title thereto to some one else, is yet designedly left by the Legislature with full power to give good title to the subsequent purchaser. Had the purchaser in the second transaction been party to anything in the way of hindering or delaying the first purchaser in the registration of his title, for the purpose of securing to himself, the second purchaser, priority of registration, then there would clearly be fraud within the meaning of the proviso. And it is possible to put many other cases of the like character." The language just cited suggests a point, which it is not necessary to decide at present, whether the words "fraud in securing the registration" in section 17 of Ordinance No. 14 of 1891 should be interpreted as meaning some fraudulent act in connection with the registration itself. (See, *e.g.*, *Crowly v. Bergtheil.*[2]) In the case of *Goonesekera v. Goonetilleke*,[3] Sir John Bonser C.J., in whose judgment Wendt J. concurs, makes use of the following language : "We cannot accede to the view of the District Judge that notice of the prior instrument at the time of paying valuable consideration for a second conveyance or charge is sufficient to exclude the party taking that conveyance or charge from the benefit of the Ordinance, "and in support of that he refers to the two cases which I have already cited. It is clear, I think, from Sir John Bonser's language, that he is speaking of the bare fact of notice, and that all that he intended to hold was that that bare fact was not in itself sufficient to deprive the second purchaser of the benefit of his priority. At the close of his judgment, Bonser C.J. says, dealing with an argument which had been addressed to the Court, "We do not think it would be right to unsettle principles which have been considered as law for many years."

The only cases that can be cited on the other side are *Wijewardene v. Perera*[4] and *Brodie v. Anthony*.[5] I respectfully agree with the

[1] *(1878) 1 S. C. C. 84.*
[2] *(1899) A. C. 374.*
[3] *(1902) 2 Br. 399.*
[4] *(1881) 4 S. S. C. 9,*
[5] *(1889) 9 S. C. C. 28.*

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grounds on which Bonser C.J. distinguished those two cases in *Goonesekera v. Goonetilleke.* The first is no authority at all, for the second mortgage was distinctly expressed to be only a secondary mortgage and to be subject to the prior mortgage which it recited. "It is quite obvious," said Bonser C.J., "that the registration of that secondary mortgage would not avail to give it priority over the primary mortgage, for ..... the mortgages were not adverse, and therefore the case was not within the words of the Ordinance." In *Brodie v. Anthony* the second mortgage recited that some of the mortgaged lands were subject to a prior mortgage. In the case of *Kanapathipillai v. Kannachi,*[1] I do not understand my brother Grenier to have laid down any general rule in a contrary sense. It appears from the terms of the judgment that the second defendant-appellant, whose conduct was in question, was himself an attesting witness to the deed of gift in favour of the plaintiff, and the transfer deed in favour of the second defendant recites that the deed of revocation formed a link in the chain of title.

I do not think that there is any real conflict between any of the decisions to which I have referred. There is one further point as to which I wish to say a word. As already mentioned, the proviso to section 17 says that "fraud or collusion in obtaining such last mentioned deed" as well as "in securing such prior registration, shall defeat the priority of the person claiming thereunder." If there were any doubts in the present case as to whether the facts amounted to fraud in securing the prior registration, they disclose, in my opinion, fraud or collusion in connection with the grant of the later deed, on which the fourth defendant-appellant is bound to rely.

On these grounds I would dismiss this appeal with costs.

GRENIER J.—I agree.

Appeal dismissed.

[1] *(1910) 13 N. L. R. 166.*